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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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JOHN A. INDIVERI,
Plaintiff,
v.
RICHARD MACK, et al.,
Defendants.

Case No. 17-00595 BLF (PR)

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

(Docket Nos. 41, 71)

Plaintiff, a California state prisoner, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983, against medical personnel at the Salinas Valley State Prison (“SVSP”). The Court found the second amended complaint, (Docket No. 38, hereafter “SAC”), stated a cognizable medical claim under the Eighth Amendment and exercised supplemental jurisdiction over the state claim of intentional infliction of emotional distress and ordered Defendants Richard Mack, Dr. K. Kumar, Dr. D. Do-Williams, Dr. J. Dunlap, Dr. L. Gamboa, and Nurse H. Hanter at to file a motion for summary judgment or other dispositive motion. (Docket No. 47.) Plaintiff filed a motion for summary judgment based on Defendants’ filing of a waiver of reply. (Docket No. 41, hereafter “Pl.’s MSJ.”) Then Defendants filed a motion for summary judgment asserting that they did not act with deliberate indifference to any of Plaintiff’s medical needs, his claim for damages for the

1 state claim is barred, his claim for injunctive relief is moot, and they are entitled to
2 qualified immunity. (Docket No. 71, hereafter “Defs.’ MSJ”¹) Concurrently, Defendants
3 filed opposition to Plaintiff’s summary judgment motion. (*Id.*) Thereafter Plaintiff filed
4 no further briefing, neither a reply to his summary judgment motion nor an opposition to
5 Defendants’ summary judgment motion. To the extent relevant, the Court has considered
6 Plaintiff’s motion for summary judgment as his opposition to Defendants’ motion.

7 Plaintiff filed his summary judgment motion on April 18, 2018, after Defendants
8 filed a waiver of reply to the second amended complaint on March 21, 2018, and before
9 any responsive pleading had been filed by Defendants. (Docket No. 40.) Plaintiff argues
10 in his motion that Defendants’ waiver of reply is a “failure to deny allegations of a
11 complaint [and] constitute[s] a judicial admission.” (Pl.’s MSJ at 1.) Plaintiff asserts that
12 “[n]o additional evidence is required to prove the matters so admitted.” (*Id.*) However, as
13 Defendants point out, 42 U.S. § 1997e (g) provides that a defendant may waive their right
14 to reply to any action brought by a prisoner, that “such waiver shall not constitute an
15 admission of the allegations in the complaint,” and that “[n]o relief shall be granted to the
16 plaintiff unless a reply has been filed.” (Defs.’ MSJ at 22.) Plaintiff is simply mistaken in
17 asserting that Defendants’ waiver of reply constitutes an admission, and that he is entitled
18 to summary judgment based thereon. Furthermore, Plaintiff had an opportunity to file an
19 opposition to Defendants’ summary judgment motion or a cross-motion for summary
20 judgment. He did not. Accordingly, his motion for summary judgment is **DENIED** as
21 premature and as without merit.

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24 ¹ In support of their motion, Defendants provide the declarations of Defendants Dr. Do-
25 Williams, (Docket No. 73), Dr. Kumar, (Docket No. 74), Dr. Dunlap, (Docket No. 77), Dr.
26 Gamboa, (Docket No. 78), Dr. R. Mack, (Docket No. 79), and Nurse Hanter, (Docket No.
27 80), as well as those of non-parties K. Robinson, (Docket No. 75), Dr. Murrell, (Docket
No. 76), and J. Nygaard, (Docket No. 81). Defendants provide authenticated copies of
Plaintiff’s medical records in support of their summary judgment motion. (*See* Kumar
Decl., Ex. A.)

1 For the reasons discussed below, Defendants' summary judgment motion is
2 **GRANTED.**

3 **DISCUSSION**

4 **I. Statement of Facts²**

5 **A. Defendants**

6 Defendant Dr. Dunlap is the Deputy Medical Executive of California Correctional
7 Health Care Services, ("CCHCS"), and was the Acting Chief Medical Executive at SVSP
8 from November 12, 2013 to May 4, 2015. (Dunlap Decl. ¶ 2.)

9 Defendant Dr. Kumar is currently the Chief Medical Executive at SVSP, and the
10 Chief Physician and Surgeon at SVSP from 2013 to May 2015. (Kumar Decl. ¶¶ 3-4.)

11 Defendant Dr. Gamboa is a physician at SVSP, who served as the Chief Physician
12 and Surgeon at SVSP from June 15, 2015 to April 1, 2017. (Gamboa Decl. ¶ 2.)

13 Defendant Dr. Do-Williams is a telemedicine physician employed by CCHCS.
14 (Do-Williams DEcl. ¶ 1.)

15 Defendant Dr. Mack was Plaintiff's primary care physician ("PCP") from
16 approximately December 28, 2011, to March 1, 2013, and is no longer employed at SVSP.
17 (Mack Decl. ¶¶ 2, 3.)

18 Defendant Hanter is a nurse practitioner and was previously employed at SVSP for
19 six months. (Hanter Decl. ¶ 2.)

20 **B. Psyllium-Powder Ban**

21 There are three main types of soluble-fiber supplements: psyllium, methylcellulose,
22 and polycarbophil. (Murrell³ Decl. ¶ 8.) All three are bulk-forming laxatives used to treat

24 ² The following facts as presented by Defendants are undisputed because Plaintiff has not
25 filed an opposition to Defendants' motion for summary judgment.

26 ³ Defendants submit the declaration of Dr. Zuri Murrell as an expert medical witness, who
27 reviewed Plaintiff's medical records from the CDCR and relevant hospitals, CCHCS
Formulary, and the CDCR Basic Menu Framework of the Regular Heart Healthy Diet, to
give an opinion as to whether the discontinuation of psyllium powder was medically
appropriate. (Murrell Decl. ¶ 3.)

1 constipation and contain soluble fiber that helps absorb water in the gut to improve
2 regularity and make bowel movements easier. (*Id.*) Metamucil is a brand of psyllium
3 powder, Citrucel is a brand of methylcellulose, and Fiber-Lax is a brand of polycarbophil.
4 (*Id.*)

5 On October 30, 2013, CCHCS issued a memorandum temporarily banning the
6 dispensing of psyllium powder at all CDCR institutions due to safety and security
7 concerns. (Dunlap Decl. ¶ 4, Ex. A.) The memorandum referenced a Los Angeles County
8 Sheriff's Department intelligence report describing a new tactic used by inmates to make
9 weapons using psyllium powder. (*Id.*) Institutional staff were directed to discontinue all
10 psyllium orders and obtain alternative medication orders if medically indicated. (*Id.*)
11 CCHCS permanently banned psyllium powder on December 17, 2013. (Dunlap Decl. ¶ 5,
12 Ex. B.)

13 Defendants assert that they played no role in the decision to ban psyllium powder.
14 (Dunlap Decl. ¶ 6; Kumar Decl. ¶ 9; Gamboa Decl. ¶ 4; Do-Williams Decl. ¶ 1; Mack
15 Decl. ¶ 4; Hanter Decl. ¶ 2.)

16 **C. Dietary Fiber**

17 Consumption of fiber through food is the preferred way for a person to obtain the
18 recommended daily amount of 25-30 grams of fiber. (Murrell Decl. ¶ 6.)

19 The CDCR “heart-healthy” menu served to all inmates, except those on special
20 medical or religious diets, provides approximately 38 grams of fiber a day through three
21 and a half cups of vegetables and two cups of fruit. (Robinson Decl. ¶ 3, Ex. A at
22 DEF001451.) This diet exceeds the recommended daily amount of fiber of 25-30 grams.
23 (Murrell Decl. ¶ 9.) Plaintiff is not on a special medical or religious diet, and thus receives
24 the standard hearth-healthy meal. (Kumar Decl. ¶ 19.)

25 **D. Plaintiff’s Relevant Medical Treatment**

26 Plaintiff underwent hemorrhoid surgery on July 5, 2012. (Kumar Decl. ¶ 7, Ex. A
27 at DEF000151-53.) The surgeon, Dr. Palmer, recommended that Plaintiff receive psyllium

1 powder three times a day. (*Id.* at DEF000152.) At a post-operative follow-up appointment
2 on August 31, 2012, Dr. Palmer recommended that Plaintiff continue to receive psyllium
3 powder three times a day. (*Id.* at DEF000196.) At his deposition, Dr. Palmer clarified that
4 Plaintiff did not specifically need psyllium fiber, and that any fiber would work.
5 (Nygaard⁴ Decl., Ex. A at 38:7-10.)

6 Plaintiff regularly received psyllium powder until mid-October of 2013. (Kumar
7 Decl. ¶ 8, Ex. A at DEF000262, 264, 267, 276, 278, 281, 299, 307-08, 310-12, 329-32,
8 334-36, 339-42, 349-51, 353-356, 359.) Psyllium powder was banned shortly thereafter,
9 first temporarily on October 30, 2013, and then permanently on December 17, 2013.
10 (Dunlap Decl. ¶¶ 4-5, Exs. A, B.)

11 Before the ban, psyllium powder was classified as a non-formulary drug. (Kumar
12 Decl. ¶ 10.) When a physician recommends that an inmate receive a non-formulary drug,
13 they must submit a Non Formulary Drug Request. (*Id.*) The Chief Medical Executive or
14 Chief Physician and Surgeon reviews the request, and either approves or disapproves it.
15 (*Id.*)

16 Defendant Dr. Kumar, as Chief Physician and Surgeon, reviewed a January 18,
17 2013 request by Defendant Dr. Mack for non-formulary psyllium powder. (Kumar Decl. ¶
18 10.) Somehow, Defendant Kumar received two copies of the request form. (*Id.*) On one
19 form, Defendant Kumar placed an “X” in the box next to “Disapproved,” and noted that
20 alternatives should be used. (*Id.*, Ex. A at DEF000258.) On the other form, Defendant
21 Kumar placed an “X” in the box next to “Approved,” but then scratched out the “X,” drew
22 a diagonal line through the form, and wrote “duplicate.” (*Id.*, Ex. A at DEF000259.)
23 Defendant Kumar’s intention was to deny the non-formulary request, and to have
24 Defendant Mack pursue alternative treatments. (*Id.* ¶ 10.) The pharmacy, however,
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26 ⁴ Defendants submit the declaration of J. Nygaard, deputy attorney general, who conducted
27 the depositions of Dr. B. M. Palmer and Dr. M. Tabbaa, along with excerpts from the
transcripts of those depositions as exhibits. (Nygaard Decl., Exs. A, B.)

1 continued to administer psyllium powder until October 1, 2013, when Plaintiff received a
2 final ten-day supply. (*Id.*, Ex. A at DEF000262, 264, 267, 276, 278, 281, 299, 307-08,
3 310-12, 329-32, 334-36, 339-42, 349-51, 353-356, 359.)

4 For the first time on September 27, 2013, Plaintiff was prescribed a thirty-day
5 supply of calcium polycarbophil tablets (fiber-lax). (Kumar Decl. ¶ 11, Ex. A at
6 DEF000357, 365.) Plaintiff sought no medical treatment for an allergic reaction to the
7 fiber-lax tablets after receiving them on September 27, 2013, yet he twice sought medical
8 care for unrelated issues over the following three weeks. (*Id.*, Ex. A at DEF000366, 377.)
9 He was seen by registered nurses in response to each request, but there is no indication that
10 he reported any type of allergic reaction to fiber-lax to the nurses. (*Id.*, Ex. A at
11 DEF000367-69, DEF000378-80.) On October 30, 2013, however, Dr. Birdsong noted an
12 allergy to fiber-lax on a medication-reconciliation form, but there is nothing in Dr.
13 Birdsong's progress notes to indicate that Plaintiff experienced an allergic reaction to
14 fiber-lax.⁵ (*Id.*, Ex. A at DEF000382-84.) An allergy causes a potentially life-threatening
15 autoimmune reaction, and includes symptoms such as hives, rash, itching, vomiting, chest
16 pain, trouble breathing, or trouble swallowing. (Murrell Decl. ¶ 10; Kumar ¶ 11; Do-
17 Williams Decl. ¶ 3.) Abdominal pain and cramping are not allergic reactions, but more
18 likely unpleasant side effects to bulking fiber, such as fiber-lax. (*Id.*) The same side
19 effects can be experienced taking psyllium powder. (*Id.*) Other than Dr. Birdsong's single
20 notation, there is no indication in Plaintiff's medical records that he has ever experienced
21 an allergic reaction to fiber-lax. (*Id.*)

22 Defendant Dr. Do-Williams's first encounter with Plaintiff was a telemedicine visit
23 on December 5, 2014. (Do-Williams Decl. ¶ 2; Kumar Decl., Ex. A at DEF000480-82.)
24 The primary purpose of this appointment was to address an inmate appeal in which
25 Plaintiff requested reinstatement of his previous prescription for psyllium powder. (*Id.*)

26
27 ⁵ Defendant Kumar states that Dr. Birdsong died in 2017, and he was therefore unable to
confer with him about this issue. (Kumar Decl. ¶ 11.)

1 Defendant Do-Williams explained to Plaintiff that psyllium powder was banned from
2 CDCR institutions, and that natural fiber found in food works the same way. (*Id.*)
3 Defendant Do-Williams advised Plaintiff that increasing his consumption of fruits and
4 vegetables would be a good way for him to receive fiber. (*Id.*) However, Plaintiff was not
5 interested in talking about food and said that he would keep writing to the court to obtain
6 psyllium. (*Id.*)

7 Defendant Do-Williams noted that it was documented in Plaintiff's medical record
8 that he had an allergy to fiber capsules, with the explanation that fiber capsules cause him
9 abdominal pain and cramping. (Do-Williams Decl. ¶ 3.) In Defendant Do-Williams's
10 professional opinion, the medical record incorrectly identified an allergy to fiber capsules
11 based on an incorrect assessment. (*Id.*) She opined that incorrect assessments can lead to
12 mistreatments, medical errors, and missed opportunities for treatments. (*Id.*) Therefore,
13 Defendant Do-Williams ordered the removal of fiber capsules from Plaintiff's allergy list.
14 (*Id.*; Kumar Decl., Ex. A at DEF000483.)

15 Although Plaintiff insisted that he must receive psyllium powder rather than fiber
16 capsules, Defendant Do-Williams thought that psyllium powder, even if it had not been
17 banned, would likely cause him to experience the same side effects that the fiber capsules
18 had, as any bulking agent would work the same way. (Do-Williams Decl. ¶ 3.) Moreover,
19 Defendant Do-Williams determined that there was no medical necessity for Plaintiff to
20 receive psyllium powder because he could obtain the same fiber benefits from food. (*Id.*)
21 Defendant Do-Williams also prescribed an antacid chew for heartburn. (*Id.*; Kumar Decl.,
22 Ex. A at DEF000484.)

23 Defendant Do-Williams's next and last encounter with Plaintiff was a telemedicine
24 visit on January 21, 2015. (Do-Williams Decl. ¶ 4; Kumar Decl., Ex. A at DEF000489-
25 91.) The primary purpose of this appointment was to address an inmate appeal in which
26 Plaintiff requested to be seen by a specialist for a liver biopsy. (*Id.*) Plaintiff reported that
27 he had been having pain in his right abdomen for at least three years but refused to discuss
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1 details regarding his bowel movements or provide any further description of the pain. (*Id.*)
2 There was no discussion regarding Plaintiff's previous request for psyllium powder at this
3 appointment, and Defendant Do-Williams again saw no medical need for it. (*Id.*) Plaintiff
4 was adamant about receiving a biopsy and Defendant Do-Williams found it difficult to
5 discuss other issues with him. (*Id.*) When Defendant Do-Williams explained to Plaintiff
6 that a biopsy was not medically indicated, he appeared to become upset, and walked out of
7 the exam room stating that he was doing so because his request for a liver biopsy had been
8 unfulfilled. (*Id.*)

9 Defendant Gamboa approved a gastroenterology referral in his capacity as Chief
10 Physician and Surgeon on October 20, 2015. (Gamboa Decl. ¶ 5; Kumar Decl., Ex. A at
11 DEF000532.) This was Defendant Gamboa's first involvement with Plaintiff's medical
12 treatment following the psyllium-powder ban. (*Id.*)

13 Defendant Nurse Hanter met with Plaintiff on April 21, 2015. (Hanter Decl. ¶ 4;
14 Kumar Decl., Ex. A at DEF000510-12.) The purpose of this appointment was to examine
15 and interview Plaintiff in response to an inmate appeal that he had submitted requesting
16 that his fiber-tablet allergy be replaced in his medical file, and that Defendant Do-Williams
17 be audited, suspended, banned, and discharged from employment at CDCR. (Hanter Decl.
18 ¶ 4; Kumar Decl., Ex. A at DEF000510.) Defendant Hanter examined Plaintiff and noted
19 that he appeared to be a well-nourished and well-developed male. (Hanter Decl. ¶ 4;
20 Kumar Decl., Ex. A at DEF000511.) When Defendant Hanter examined Plaintiff's
21 abdomen, he observed no abnormal enlargement of the organs, and heard positive bowel
22 sounds in all quadrants of the abdomen, which is normal. (*Id.*) Defendant Hanter noted
23 that Plaintiff was ambulatory, functional, and in no apparent distress. (*Id.*) During this
24 encounter, Plaintiff also requested psyllium powder. (Hanter Decl. ¶ 4; Kumar Decl., Ex.
25 A at DEF000510-11.) Defendant Hanter explained that psyllium powder was banned at
26 CDCR institutions for safety and security reasons. (*Id.*) Plaintiff reported that he was
27 aware of the ban, and that he had filed a lawsuit to receive it. (*Id.*) Although Plaintiff

1 claimed to be experiencing diarrhea, he appeared fully functional to Defendant Hanter,
2 with no signs of toxicity or dehydration. (*Id.*) Defendant Hanter determined that there was
3 no medical necessity for Plaintiff to receive psyllium powder and denied the request. (*Id.*)
4 Defendant Hanter also referred him for a follow-up appointment with his primary care
5 provider in sixty to ninety days. (Hanter Decl. ¶ 4; Kumar Decl., Ex. A at DEF000512.)
6 This was Defendant Hanter's only encounter with Plaintiff. (*Id.*)

7 Plaintiff was seen by Dr. Tabbaa, a gastroenterologist at Natividad Medical Center
8 who is not a party to this action, on December 23, 2015. (Kumar Decl. ¶ 13, Ex. A at
9 DEF000551-53.) Dr. Tabbaa diagnosed Plaintiff with constipation. (*Id.*, Ex. A at
10 DEF000552.) He recommended resuming psyllium, if available at the prison, but also
11 indicated that five servings of vegetables or fruit could provide Plaintiff with enough
12 natural fibers. (*Id.*) At his deposition, Dr. Tabbaa testified that if a person gets enough
13 fiber in their diet, there may be no need for a fiber supplement. (Nygaard Decl., Ex. B at
14 53:25, 54:1-3.) Dr. Tabbaa also testified that he would not have told Plaintiff that he
15 would be required to take psyllium for the rest of his life because Dr. Tabbaa will always
16 try to correct his patients' diets so that they do not need medicine. (*Id.*, Ex. B at 53:17-23.)
17 Dr. Tabbaa also recommended a stool softener, such as Colace, twice a day, and colonic
18 cleansing with GoLYTLEY. (Kumar Decl. ¶ 13, Ex. A at DEF000552.) As an off-site
19 physician, Dr. Tabbaa did not have the authority to order medications for CDCR inmates
20 and could only make recommendations. (*Id.* ¶ 13.) Because psyllium was banned, the
21 medical providers at SVSP could not follow Dr. Tabbaa's recommendation for psyllium,
22 but they alternatively prescribed docusate sodium, a stool softener used to treat and prevent
23 constipation due to hard stools, cortisone suppositories for control of internal hemorrhoids,
24 and lactulose, a medication used to treat constipation. (*Id.*, Ex. A at DEF000561-62,
25 DEF000596.) Plaintiff was also prescribed GoLYTLEY and Colace, as Dr. Tabbaa
26 recommended. (*Id.* at DEF000558.)

27 About five months later on May 16, 2016, Plaintiff saw Dr. Tabbaa for a follow-up

1 visit. (Kumar Decl. ¶ 14, Ex. A at DEF000610-11.) Dr. Tabbaa recommended continuing
2 Plaintiff on the lactulose and prescribing psyllium. (*Id.*, Ex. A at DEF000611.) Dr.
3 Tabbaa testified at his deposition, however, that there are many other fiber medications
4 that will work, not just psyllium. (Nygaard Decl., Ex. B at 54:6-13.) Again, the medical
5 providers at SVSP could not follow Dr. Tabbaa's recommendation for psyllium as it was
6 banned, but they continued to prescribe lactulose, docusate sodium, and cortisone
7 suppositories, as well as prescribing bisacodyl, a stimulant laxative used to treat
8 constipation. (Kumar Decl. ¶ 14, Ex. A at DEF000618-19, 21.) Although Plaintiff alleges
9 that Defendants Kumar, Mack, and Hanter "rewrote" Dr. Tabbaa's prescription for fiber-
10 lax following this appointment, neither Defendant Hanter nor Defendant Mack were still
11 employed at SVSP as of May 16, 2016, and therefore, did not rewrite any such
12 prescription. (Mack Decl. ¶ 5; Hanter Decl. ¶ 5.) Plaintiff was next prescribed fiber-lax
13 on October 3, 2016, by Dr. Birdsong not Defendant Kumar. (Kumar Decl. ¶ 12, Ex. A at
14 DEF000663-64, 68.) After Plaintiff refused to take the fiber-lax, the prescription was last
15 filled on March 23, 2017. (*Id.*, Ex. A at DEF000766.)

16 Defendant Gamboa approved another gastroenterology referral on March 3, 2017.
17 (Gamboa Decl. ¶ 7; Kumar Decl., Ex. A at DEF000748.) Plaintiff was then seen again by
18 Dr. Tabbaa on April 5, 2017, who noted "no emergency today." (Kumar Decl. ¶ 15, Ex. A
19 at DEF00765.) The medical providers at SVSP continued to prescribe lactulose and
20 cortisone suppositories, as well as prescribing a topical hydrocortisone cream. (*Id.*, Ex. A
21 at DEF000769.) Although Plaintiff expressed hesitation to take lactulose because he did
22 not want to gain weight, weight gain is not a side effect of lactulose. (Murrell Decl. ¶ 11;
23 Nygaard Decl., Ex. B at 42:7-9.)

24 Plaintiff was seen by Dr. Ibrahimi, a non-party to this action, on August 30, 2017.
25 (Kumar Decl. ¶ 16, Ex. A at DEF000790-91.) Dr. Ibrahimi noted that Plaintiff had
26 reportedly experienced abdominal cramps, bloating, and discomfort from fiber-lax. (*Id.* ¶
27 16, Ex. A at DEF000790.) Dr. Ibrahimi noted that this is not an allergic reaction, but

1 rather an adverse reaction. (*Id.*) Plaintiff denied experiencing hives, itching, or shortness
2 of breath when he takes fiber supplements. (*Id.*) These would be symptoms of a true
3 allergic reaction. (*Id.* ¶ 16; Murrell Decl. ¶ 10.) Dr. Ibrahimi prescribed methylcellulose
4 (Citrucel). (Kumar Decl. ¶ 16, Ex. A at DEF000794; Murrell Decl. ¶ 8.)

5 Defendant Gamboa then saw Plaintiff on December 19, 2017, for an appointment
6 following a colonoscopy Plaintiff had recently undergone. (Gamboa Decl. ¶ 8; Kumar
7 Decl., Ex. A at DEF001190-91.) The colonoscopy results revealed a normal colon. (*Id.*)
8 Tissue samples were taken for biopsy during the colonoscopy, but Defendant Gamboa had
9 not received the results. (*Id.*) Plaintiff reported that he still experienced on-and-off
10 colicky abdominal pain and diarrhea. (Gamboa Decl. ¶ 8; Kumar Decl., Ex. A at
11 DEF001190.) Defendant Gamboa noted that Plaintiff was currently taking lactulose (a
12 medication used to treat constipation), and methylcellulose. (*Id.*) Defendant Gamboa
13 continued those prescriptions as well as Bentyl, a medication used in the treatment of
14 irritable bowel syndrome. (Gamboa Decl. ¶ 8; Kumar Decl., Ex. A at DEF001122.)

15 Defendant Gamboa saw Plaintiff on January 6, 2018, to discuss the biopsy results.
16 (Gamboa Decl. ¶ 9; Kumar Decl., Ex. A at DEF001264-65.) The tissue samples revealed
17 no evidence of acute colitis, dysplasia, or malignancy. (Gamboa Decl. ¶ 9; Kumar Decl.,
18 Ex. A at DEF001264.) Defendant Gamboa conducted a rectal exam and noted the
19 presence of a rectal cyst skin tag. (Gamboa Decl. ¶ 9; Kumar Decl., Ex. A at DEF001265.)
20 He also observed tenderness to the right and anterior perirectal areas, but palpated no
21 abnormal masses, and noted no gross blood. (*Id.*) Plaintiff requested to see a specialist
22 again for his diarrhea and rectal bleeding, and Defendant Gamboa submitted a request for
23 referral to a gastroenterologist which was approved. (Gamboa Decl. ¶ 9; Kumar Decl., Ex.
24 A at DEF001265, DEF001267.)

25 Plaintiff was seen by Dr. Virant, a non-party to this action, on June 19, 2018.
26 (Kumar Decl. ¶ 17, Ex. A at DEF001343.) Dr. Virant had previously recommended that
27 Plaintiff keep a food diary and follow an elimination diet, such as avoiding dairy for two

1 weeks, and noted that Plaintiff had not really done so. (*Id.*) Dr. Virant again
2 recommended that Plaintiff keep a food diary with associated symptoms and suggested that
3 he try eliminating certain foods from his diet for two weeks, including dairy, coffee,
4 gluten, and eggs, to see if there is any improvement of his symptoms. (*Id.* at DEF001344.)
5 Dr. Virant noted that Plaintiff had been eating a lot of oatmeal, which Plaintiff thought had
6 improved his symptoms. (*Id.*) Oatmeal is a fiber-rich food. (Kumar Decl. ¶ 17.) Dr.
7 Virant also noted that anxiety could be playing a factor and referred him to psychiatry.
8 (*Id.*, Ex. A at DEF001344.)

9 Plaintiff was most recently seen by Dr. Huynh on December 10, 2018. (*Id.* ¶ 18;
10 Ex. A at DEF1467-68.) Plaintiff stated that he did not want to go over his detailed history
11 of chronic diarrhea, and again insisted that the only thing that brings him relief is
12 Metamucil, and that he has brought this lawsuit to obtain it. (*Id.* at DEF001468.) Plaintiff
13 continues to be prescribed methylcellulose. (*Id.*)

14 **E. Defendant Dr. Dunlap**

15 As the acting Chief Medical Executive at SVSP, Defendant Dunlap had minimal
16 involvement in providing direct patient care. (Dunlap Decl. ¶ 3.) Defendant Dunlap was
17 not Plaintiff's primary care physician, or treating physician, and does not recall any in-
18 person interactions with Plaintiff. (*Id.*) Defendant Dunlap was not responsible for
19 Plaintiff's day-to-day medical care, and does not believe that he consulted with, or directly
20 supervised, Plaintiff's primary care physicians. (*Id.*)

21 **F. Claims**

22 According to the allegations in the second amended complaint, Plaintiff was
23 prescribed psyllium by Dr. Palmer following surgery in June 2012; the prescription was
24 effective. (SAC at 3.) Plaintiff claims that in December 2013, Defendants "conspired and
25 agreed to stop issuing psyllium regardless of the medical need." (*Id.*) Plaintiff asserts that
26 Defendants substituted psyllium with fiber-lax, ignoring the fact that his medical records
27 indicated that he was allergic to it. (*Id.*) When he filed an administrative appeal on the

1 matter, Defendant Do-Williams ordered that fiber-lax be removed from Plaintiff's list of
2 known allergies. (*Id.*) When Dr. Palmer wrote a new order for psyllium in May 2014,
3 Defendants ignored that order and replaced it with fiber-lax. (*Id.*) When Dr. Tabbaa
4 prescribed psyllium in December 2014, Defendants again ignored the order and substituted
5 fiber-lax. (*Id.* at 4.) Plaintiff claims that Defendants "acted intentionally and deliberately
6 with the full knowledge that by withholding the prescribed psyllium the consequences
7 would be harmful and injure the plaintiff." (*Id.* at 5.) Based on these allegations, the
8 Court found Plaintiff stated a cognizable Eighth Amendment claim for deliberate
9 indifference to serious medical needs. (Docket No. 47 at 3.) The Court exercised
10 supplemental jurisdiction over Plaintiff's state claim for intentional infliction of emotional
11 distress. (*Id.*)

12 **II. Summary Judgment**

13 Summary judgment is proper where the pleadings, discovery and affidavits show
14 that there is "no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law." Fed. R. Civ. P. 56(a). A court will grant summary judgment
16 "against a party who fails to make a showing sufficient to establish the existence of an
17 element essential to that party's case, and on which that party will bear the burden of proof
18 at trial . . . since a complete failure of proof concerning an essential element of the
19 nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v.*
20 *Cattrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of
21 the lawsuit under governing law, and a dispute about such a material fact is genuine "if the
22 evidence is such that a reasonable jury could return a verdict for the nonmoving party."
23 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

24 Generally, the moving party bears the initial burden of identifying those portions of
25 the record which demonstrate the absence of a genuine issue of material fact. *See Celotex*
26 *Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue
27 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other

1 than for the moving party. But on an issue for which the opposing party will have the
2 burden of proof at trial, the moving party need only point out “that there is an absence of
3 evidence to support the nonmoving party’s case.” *Id.* at 325. If the evidence in opposition
4 to the motion is merely colorable, or is not significantly probative, summary judgment may
5 be granted. *See Liberty Lobby*, 477 U.S. at 249-50.

6 The burden then shifts to the nonmoving party to “go beyond the pleadings and by
7 her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on
8 file,’ designate specific facts showing that there is a genuine issue for trial.”” *Celotex*
9 *Corp.*, 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this
10 showing, “the moving party is entitled to judgment as a matter of law.” *Id.* at 323.

11 The Court’s function on a summary judgment motion is not to make credibility
12 determinations or weigh conflicting evidence with respect to a material fact. *See T.W.*
13 *Elec. Serv., Inc. V. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).
14 The evidence must be viewed in the light most favorable to the nonmoving party, and the
15 inferences to be drawn from the facts must be viewed in a light most favorable to the
16 nonmoving party. *See id.* at 631. It is not the task of the district court to scour the record
17 in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.
18 1996). The nonmoving party has the burden of identifying with reasonable particularity
19 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to do so,
20 the district court may properly grant summary judgment in favor of the moving party. *See*
21 *id.*; *see, e.g., Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028-29
22 (9th Cir. 2001).

23 A. **Deliberate Indifference**

24 Deliberate indifference to a prisoner’s serious medical needs violates the Eighth
25 Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the
26 Eighth Amendment only when two requirements are met: (1) the deprivation alleged is,
27 objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent

1 to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

2 A "serious" medical need exists if the failure to treat a prisoner's condition could
3 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.*
4 The following are examples of indications that a prisoner has a "serious" need for medical
5 treatment: the existence of an injury that a reasonable doctor or patient would find
6 important and worthy of comment or treatment; the presence of a medical condition that
7 significantly affects an individual's daily activities; or the existence of chronic and
8 substantial pain. *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled
9 on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)
10 (en banc).

11 A prison official is deliberately indifferent if he knows that a prisoner faces a
12 substantial risk of serious harm and disregards that risk by failing to take reasonable steps
13 to abate it. *See Farmer*, 511 U.S. at 837. The official must both know of "facts from
14 which the inference could be drawn" that an excessive risk of harm exists, and he must
15 actually draw that inference. *Id.* If a prison official should have been aware of the risk,
16 but was not, then the official has not violated the Eighth Amendment, no matter how
17 severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002).

18 In order for deliberate indifference to be established, therefore, there must be a
19 purposeful act or failure to act on the part of the defendant and resulting harm. *See*
20 *McGuckin*, 974 F.2d at 1060; *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d
21 404, 407 (9th Cir. 1985). A finding that the defendant's activities resulted in "substantial"
22 harm to the prisoner is not necessary, however. Neither a finding that a defendant's
23 actions are egregious nor that they resulted in significant injury to a prisoner is required to
24 establish a violation of the prisoner's federal constitutional rights, *McGuckin*, 974 F.2d at
25 1060, 1061 (citing *Hudson v. McMillian*, 503 U.S. 1, 7-10 (1992) (rejecting "significant
26 injury" requirement and noting that Constitution is violated "whether or not significant
27 injury is evident")), but the existence of serious harm tends to support an inmate's

1 deliberate indifference claims, *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing
2 *McGuckin*, 974 at 1060).

3 “A difference of opinion between a prisoner-patient and prison medical authorities
4 regarding treatment does not give rise to a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d
5 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing more than a difference of
6 medical opinion as to the need to pursue one course of treatment over another is
7 insufficient, as a matter of law, to establish deliberate indifference, *see Toguchi v. Chung*,
8 391 F.3d 1051, 1058, 1059-60 (9th Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.
9 1989); *Mayfield v. Craven*, 433 F.2d 873, 874 (9th Cir. 1970).

10 **1. Ban of Psyllium Powder**

11 The evidence presented does not show a genuine dispute as to any material fact
12 relating to Plaintiff’s claim of deliberate indifference against Defendants for discontinuing
13 psyllium powder and replacing it with other fiber supplements. Assuming Plaintiff’s
14 medical condition was “serious,” he fails to satisfy the second prong, i.e., that Defendants
15 were subjectively, deliberately indifferent to his medical needs because they failed to take
16 reasonable steps to abate a substantial risk of serious harm. *See Farmer*, 511 U.S. at 834,
17 837. As Defendants point out, the undisputed evidence shows that CCHCS implemented a
18 statewide policy banning the distribution of psyllium powder to all inmates, first
19 temporarily on October 30, 2013, and then permanently effective December 17, 2013. *See*
20 *supra* at 4. According to their declarations, none of the Defendants had any role in the
21 decision to ban psyllium powder. *Id.* Plaintiff has set forth no evidence in opposition to
22 indicate otherwise. Accordingly, Defendants have shown that there is no genuine dispute
23 as to any material fact with respect to the claim that they “conspired and agreed” to
24 withhold psyllium regardless of the medical need where there is no evidence that they were
25 involved in the decision to ban psyllium powder. Furthermore, it cannot be said that
26 Defendants acted with deliberate indifference in complying with the ban where
27 “alternative medication orders” could be made if medically indicated. *See supra* at 4.

1 Since alternative fiber supplements were available, it cannot be said that Defendants were
2 aware of a substantial risk to Plaintiff when they complied with the ban. *See Farmer*, 511
3 U.S. at 837. Therefore, Defendants are entitled to summary judgment on this claim. *See*
4 *Celotex Corp.*, 477 U.S. at 323-24.

5 Defendants have also shown that there is no genuine dispute as to any material fact
6 with respect to the claim that they “intentionally and deliberately” withheld psyllium
7 knowing that the consequences would be harmful to Plaintiff. According to the evidence
8 submitted by Defendants, Plaintiff can obtain the same benefits from the fiber-rich food in
9 the standard heart healthy diet he receives in prison. *See supra* at 4. The recommended
10 daily about of fiber is 25-30 grams. *Id.* The prison’s heart healthy diet provided
11 approximately 38 grams of fiber a day, which exceeds the recommended daily amount. *Id.*
12 Furthermore, consumption of fiber through food is the preferred way for a person to obtain
13 the recommended daily amount of fiber. *Id.* Accordingly, based on the diet he was
14 already receiving, Defendants had no reason to believe that Plaintiff would not be able to
15 receive adequate fiber if psyllium was no longer available.

16 Plaintiff asserts that Dr. Palmer and Dr. Tabbaa repeatedly prescribed psyllium
17 powder, but that Defendants wrongfully changed those orders. However, Defendants
18 submit evidence showing that psyllium was not medically necessary. Dr. Palmer and Dr.
19 Tabbaa stated in their depositions that psyllium powder specifically was not necessary, and
20 that Plaintiff could obtain fiber through other fiber supplements or by eating enough fruits
21 and vegetables daily. *Id.* at 5, 7. In addition, none of the Defendants who personally
22 treated Plaintiff thought psyllium was medically necessary. Defendant Do-Williams
23 informed Plaintiff that natural fiber found in food works in the same way as the psyllium
24 powder supplement he sought. *Id.* at 6. Defendant Gamboa also never determined that
25 psyllium powder was the only medically-appropriate treatment for Plaintiff and prescribed
26 alternative medications to treat his symptoms. (Gamboa Decl. ¶ 10.) Defendant Hanter
27 examined Plaintiff and found that there was no medical necessity for Plaintiff to receive

1 psyllium powder. *See supra* at 8-9.

2 Furthermore, the Court agrees with Defendants that Plaintiff's insistence that
3 psyllium was the only acceptable treatment is at most a difference of opinion about the
4 course of treatment between him and Defendants. (Defs.' MSJ at 16.) Such a difference
5 of opinion between a physician and prisoner regarding treatment does not rise to a § 1983
6 claim. *See Franklin*, 662 F.2d at 1344. In order to prevail on a claim involving choices
7 between alternative courses of treatment, a plaintiff must show that the course of treatment
8 the doctors chose was medically unacceptable under the circumstances and that he or she
9 chose this course in conscious disregard of an excessive risk to plaintiff's health. *Toguchi*,
10 391 F.3d at 1058; *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Farmer v.*
11 *Brennan*, 511 U.S. 825, 837 (1994)). Here, there is no disagreement between alternative
12 courses of treatment even among the treating physicians. Rather, even Dr. Palmer and Dr.
13 Tabbaa, who originally prescribed psyllium, agree with Defendants and their expert
14 witness that psyllium powder was not exclusively required, and that fiber could be ingested
15 in other ways. *See supra* at 17. Accordingly, Plaintiff has failed to show that the course of
16 treatment Defendants chose instead – fiber-rich diet, alternative fiber supplements,
17 laxatives, stool softeners, and other medications – was medically unacceptable.

18 **2. Allergy to Fiber-Lax**

19 Plaintiff claims that he is allergic to fiber-lax, that Defendants knew this fact, and
20 therefore acted with deliberate indifference in continuing to prescribe it anyway.
21 However, the only evidence that Plaintiff had an allergy to fiber-lax is the single notation
22 by Dr. Birdsong on October 30, 2013. *See supra* at 6. However, as Defendants point out,
23 Dr. Birdsong's notes fail to indicate that Plaintiff actually experienced any allergic reaction
24 to fiber-lax, e.g., hives, rash, itching, vomiting, chest pain, trouble breathing, or trouble
25 swallowing. *Id.* Rather, Plaintiff complained of abdominal pain and cramping. *Id.* All
26 the medical opinions submitted in this action agree that such symptoms are more likely
27 unpleasant side effects to the fiber-lax rather than allergic reactions. *Id.* Plaintiff has filed

1 no opposition or any evidence indicating otherwise. Accordingly, Defendants have shown
2 that there is no genuine dispute as to any material fact with respect to the claim that
3 Defendant Do-Williams incorrectly removed fiber-lax from Plaintiff's list of known
4 allergies where there was no medical indication that he indeed had such an allergy.
5 Rather, Defendant Do-Williams acted because she believed the identification of fiber
6 capsules as an allergy was based on an incorrect assessment which "can lead to
7 mistreatments, medical errors, and missed opportunities for treatment." *See supra* at 7.
8 Accordingly, it cannot be said that Defendant Do-Williams acted with deliberate
9 indifference to Plaintiff's medical needs where her actions were intended not to harm but
10 to rectify an error.

11 Plaintiff also claims that Defendants Kumar and Gamboa substituted fiber-lax on
12 December 17, 2013, ignoring documentation in his medical records that he was allergic to
13 it, and that they rewrote Dr. Tabbaa's prescriptions for psyllium as fiber-lax. (SAC at 3,
14 4.) Plaintiff also claims that Defendants Mack and Hanter rewrote Dr. Tabbaa's May 16,
15 2016 prescription. (*Id.* at 4.) Lastly, Plaintiff alleges that Defendant Kumar intercepted a
16 non-defendant physician's prescription for psyllium, drew a line through it, and ordered
17 fiber-lax in spite of the allergy warning in his medical records. (*Id.* at 3.) Defendants
18 argue that these allegations are contradicted by the evidence.

19 First of all, Defendants Mack and Hanter did not work at SVSP on May 16, 2016,
20 and therefore did not and could not have rewritten the prescription issued by Dr. Tabbaa on
21 that date. (Mack Decl. ¶ 5; Hanter Decl. ¶ 5.) Secondly, Defendants Kumar and Gamboa
22 never write a prescription for fiber-lax for Plaintiff. Dr. Sullivan, a non-party, first
23 prescribed fiber-lax on September 27, 2013. (Kumar Decl. ¶ 11, Ex. A at DEF000357,
24 365.) The next prescription for fiber-lax was written by Dr. Birdsong on October 3, 2016.
25 (*Id.* ¶ 12, Ex. A at DEF000663, 68.) After Plaintiff refused to take the fiber-lax, the
26 prescription was last filled on March 23, 2017. (*Id.*, Ex. A at DEF000766.) Lastly, there
27 is no evidence that Defendant "intercepted" a prescription for psyllium as Plaintiff alleges.

1 Defendant Kumar did process a January 18, 2013 request by Defendant Mack for approval
2 of psyllium when it was classified as a non-formulary drug which required her approval as
3 Chief Physician and Surgeon. (Kumar Decl. ¶ 10.) As described above, she received two
4 copies of the request form and marked them differently. *See supra* at 5-6. Her intention
5 was to deny the non-formulary request and have Defendant Mack pursue alternative
6 treatments. *Id.* However, the pharmacy continued to administer psyllium until October 1,
7 2013, when Plaintiff received a ten-day supply. *Id.* Otherwise, there is no evidence, and
8 Plaintiff does not submit any, that Defendant Kumar prescribed fiber-lax to Plaintiff.

9 In conclusion, there is no evidence that Defendants acted with deliberate
10 indifference to Plaintiff's serious medical needs. As Defendants have shown, Plaintiff was
11 seen regularly throughout the relevant time period, *i.e.*, mid-2012 through 2018, and
12 received continuous medical care for his gastroenterological needs. Furthermore, any
13 difference of opinion in the course of treatment with Defendants, as mentioned above, does
14 not give rise to a § 1983 claim. *See supra* at 17-18; *Franklin*, 662 F.2d at 1344.

15 Based on the evidence presented, Defendants have shown that there is no genuine
16 issue of material fact with respect to Plaintiff's deliberate indifference claim. *See Celotex*
17 *Corp.*, 477 U.S. at 323. Even considering Plaintiff's evidence and argument submitted in
18 his motion to summary judgment, Plaintiff has failed to point to specific facts showing that
19 there is a genuine issue for trial, *id.* at 324, or identify with reasonable particularity the
20 evidence that precludes summary judgment, *Keenan*, 91 F.3d at 1279. Accordingly,
21 Defendants are entitled to judgment as a matter of law. *Id.*; *Celotex Corp.*, 477 U.S. at
22 323.

23 **B. State Law Claim**

24 Because the Court has granted summary judgment with respect to Plaintiff's
25 deliberate indifference claims against Defendants, the only claim remaining against them is
26 Plaintiff's state claim for intentional infliction of emotional distress. The Court decided to
27 exercise supplemental jurisdiction at the outset of the action over this state claim because

1 Plaintiff's state-law and federal-law claims derived from a common nucleus of operative
2 fact such that they form part of the same case or controversy. *See United Mine Workers v.*
3 *Gibbs*, 383 U.S. 715, 725 (1966).

4 A federal court has supplemental jurisdiction over claims "that are so related to
5 claims in the action within [the district court's] original jurisdiction that they form part of
6 the same case or controversy under Article III." 28 U.S.C. § 1337(a). A district court,
7 however, may decline to exercise supplemental jurisdiction over a claim if (1) the claim
8 raises novel or complex state law issues; (2) the claim "substantially predominates" over
9 the court's original-jurisdiction claims; (3) the court has dismissed all of the original-
10 jurisdiction claims; or (4) in "exceptional circumstances" if there are "other compelling
11 reasons" to decline. 28 U.S.C. § 1337(c). In particular, "[n]eedless decisions of state law
12 should be avoided both as a matter of comity and to promote justice between the parties,
13 by procuring them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726.

14 Here, Plaintiff's tort claim is based solely on state law and should be adjudicated in
15 state court where the parties can be assured of a "surer-footed reading of application law."
16 *Id.* Specifically, the Court finds that declining supplemental jurisdiction is appropriate
17 under § 1337(a)(3) because the Court has dismissed all of the original-jurisdiction claims.
18 Accordingly, the Court will decline to assert supplemental jurisdiction over the remaining
19 state law claim. 28 U.S.C. § 1337(a)(3). The state law claim against these Defendants will
20 be dismissed without prejudice⁶ to Plaintiff's refiling the claim in state court in accordance
21 with the statutory tolling provision set forth at 28 U.S.C. § 1337(d). *See id.* ("The period
22 of limitations for any claim asserted under subsection (a), and for any other claim in the
23 same action that is voluntarily dismissed at the same time as or after the dismissal of the
24 claim under subsection (a), shall be tolled while the claim is pending and for a period of 30
25

26 ⁶ Dismissal of pendent state claims following dismissal of the related federal claims must
27 be without prejudice. *See Reynolds v. County of San Diego*, 84 F.3d 1162, 1171 (9th Cir.
1996).

1 days after it is dismissed unless State law provides for a longer tolling period.”). Whether
2 or not the claim is barred, as Defendants assert, can be adjudicated in state court. (Defs.’
3 MSJ at 19.)

4 **C. Unserved Defendants**

5 Defendants Ellen Greenman, MD, and Kathryn Graham have not been served in this
6 action although it was so ordered in the Court’s screening order of the second amended
7 complaint and then again separately in a subsequent order. (Docket Nos. 47, 58.)
8 According to the second amended complaint, Defendants Greenman and Graham worked
9 in the pharmacy and were responsible for issuing Plaintiff medications prescribed by
10 physicians. (SAC at 2.) Plaintiff claims that these two Defendants conspired with
11 Defendants Mack, Kumar, Gamboa, and Dunlap on December 17, 2013, to stop issuing
12 psyllium regardless of the medical need. (*Id.* at 3.) Plaintiff also claims Defendants were
13 allegedly involved in overriding the following prescriptions for psyllium with fiber-lax: a
14 prescription issued on May 5, 2014 by Dr. Palmer, and two by Dr. Tabbaa issued on
15 December 23, 2014, and May 16, 2016. (*Id.* at 3-4.)

16 Summary judgment may be granted by the court *sua sponte* in favor of a
17 nonappearing party on the basis of facts presented by other defendants who have appeared.
18 *See Columbia Steel Fabricators v. Ahlstrom Recovery*, 44 F.3d 800, 802-03 (9th Cir.)
19 (affirming grant of summary judgment in favor of nonappearing defendant where plaintiff,
20 in response to summary judgment motion filed by defendant who had appeared, had “full
21 and fair opportunity to brief and present evidence” on dispositive issue as to claim against
22 nonappearing defendant), cert. denied, 516 U.S. 864 (1995); *see also Abagninin v. AMVAC*
23 *Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (holding district court properly granted
24 motion for judgment on the pleadings as to unserved defendants where such defendants
25 were in a position similar to served defendants against whom claim for relief could not be
26 stated); *Silverton v. Dep’t of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding
27 district court on its own motion may grant motion to dismiss as to defendants who have not

1 moved to dismiss where such defendants are in a position similar to that of moving
2 defendants).

3 Here, Defendants Greenman and Graham are in positions similar to served
4 Defendants who have shown that that there is no genuine issue of material fact with
5 respect to Plaintiff's deliberate indifference claim. *See supra* at 20. First of all,
6 Defendants have submitted evidence establishing that the decision to permanently ban
7 psyllium on December 17, 2013, was made by the CCHCS, and that all institutional staff
8 was directed to discontinue all psyllium orders and obtain alternative medication orders if
9 medically indicated. *See supra* at 4. Accordingly, there is no evidence of a conspiracy "to
10 stop issuing psyllium regardless of the medical need" by the Defendants, including
11 Defendants Greenman and Graham. Furthermore, with respect to the overriding of
12 prescriptions for psyllium issued by Dr. Palmer and Dr. Tabbaa, both these doctors
13 testified in deposition that psyllium powder was not medically necessary and that there
14 were other means of ingesting fiber. *See supra* at 5, 7, and 17. Accordingly, even if it
15 were true that Defendants Greenman and Graham overrode psyllium prescriptions with
16 fiber-lax, Plaintiff cannot show that they did so knowing that he would face a substantial
17 risk of serious harm and yet disregarded that risk by failing to take reasonable steps to
18 abate it. *See Farmer*, 511 U.S. at 837. Rather, the medical records indicate that after
19 Plaintiff received a thirty-day supply of fiber-lax on September 27, 2013, there was no
20 report of any allergic reaction, and that Plaintiff only sought medical care for unrelated
21 issues over the following three weeks. Therefore, it cannot be said that Defendants acted
22 with deliberate indifference when they allegedly changed Dr. Palmer's May 5, 2014
23 prescription for psyllium to fiber-lax when there was no indication that it was harming
24 Plaintiff. *See supra* at 6. Furthermore, fiber-lax was removed from Plaintiff's list of
25 known allergies in early December 2014. *Id.* at 7. Accordingly, it cannot be said that
26 Defendants Greenman and Graham thereafter continued to replace psyllium prescriptions
27 with fiber-lax knowing it would create an excessive risk of harm to Plaintiff.

1 Based on a thorough review of the evidence submitted by Defendants, the Court
2 finds that Plaintiff has failed to show that Defendants acted with deliberate indifference to
3 his gastroenterological needs, specifically in discontinuing psyllium and issuing other fiber
4 supplements. As discussed above, all the physicians, both parties and non-parties to this
5 action, agree that psyllium powder was not the exclusive means for Plaintiff to ingest fiber.
6 *See supra* at 18. Accordingly, the Court *sua sponte* grants summary judgment in favor of
7 Defendants Greenman and Graham on the basis of facts presented by other Defendants
8 who have appeared, showing that there is no genuine issue of material fact with respect to
9 Plaintiff's deliberate indifference claim with respect to his gastroenterological needs. *See*
10 *Columbia Steel Fabricators*, 44 F.3d at 802-03.

CONCLUSION

13 For the reasons stated above, Defendants Richard Mack, Dr. K. Kumar, Dr. D. Do-
14 Williams, Dr. J. Dunlap, Dr. L. Gamboa, and Nurse H. Hanter's motion for summary
15 judgment, (Docket No. 71), is **GRANTED**.⁷ The claims against them are **DISMISSED**
16 with prejudice. Plaintiff's motion for summary, (Docket No. 41), is **DENIED**.

17 Because unserved Defendants Ellen Greenman and Kathryn Graham are in a
18 position similar to the Defendants who have appeared in this action, summary judgment is
19 also granted in their favor. The claims against them are **DISMISSED** with prejudice.

20 || This order terminates Docket Nos. 41 and 71.

IT IS SO ORDERED.

22 | **Dated:** March 5, 2019


BETH LABSON FREEMAN
United States District Judge

24 Order Granting Defs.' Motion for Summary Judgment
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26 ⁷ Because the Court finds that no constitutional violation occurred, it is not necessary to
27 reach Defendants' qualified immunity argument. (Defs.' MSJ at 20.) Nor is it necessary
 to discuss the mootness of Plaintiff's request for injunctive relief. (*Id.* at 19-20.)